1797.

February Term, 1797.

JENNINGS *et al.* Plaintiffs in Error, *verſus* the Brig PERSEVERANCE, *et al.*

THIS was a writ of error to remove the proceedings in an admiralty cauſe from the Circuit Court for the diſtrict of *Rhode Iſland.* Soon after the decree was there pronounced the Diſtrict Judge died, and Judge CHASE had left the diſtrict; ſo that the record was ſent up with all the evidence annexed, but no ſtatement of facts by the court.

Du Ponceau and *Robbins*, for the Defendant in error, inſiſted, that the Plaintiff could not go into a conſideration of errors in fact; and, that the rules eſtabliſhed in the caſes of *Wiſcart* v. *D'Auchy* (*ant. p.* 321.) *Pintado* v. *Bernard*, and the *United States* v. *La Vengeance*, (*ant. p.*) were concluſive. They, alſo, cited the following authorities: 1 *Vern.* 166. 214. 216. 3 *Wils.* 308. 2 *Bl. Rep.* 831. 1 *Mod.* 207. 56. 61. *Cro. E.* 667. 6 *Co.* 7.

E. Tilghman, for the Plaintiff in error, admitted, that, although the caſe of a record tranſmitted with the evidence, but without a ſtatement of facts, had never been expreſsly decided, yet, that it appeared to be embraced by the reaſoning of the Chief Juſtice, in ſupport of the ſecond rule in *Wiſcart* v. *D'Auchy*; and if the court were, alſo, of that opinion, he would decline troubling them with any further argument.*

* CHASE, Juſtice. Even if the court were to permit it, you would find little encouragement to enter into the merits: The evidence is too plainly againſt you.

PATERSON,

PATERSON, *Juſtice*:—Though I was ſilent on the occaſion, I concurred in opinion with Judge *Wilſon* upon the ſecond rule laid down in *Wiſcart* v. *D'Auchy*; and, of courſe, the court were divided, four to two, upon the deciſion. I thought, indeed, that excluding a conſideration of the evidence (which, virtually, amounts to a ſtatement of facts) was ſhutting the door againſt light and truth; and was leaving the property of the country too much to the diſcretion and judgment of a ſingle Judge. But conceiving myſelf bound by the rule, and that, in ſome ſhape, the facts muſt be made to appear on the record, I have always ſince thought it my duty to make a ſtatement, where the counſel would not, or could not, agree in forming one. 1797.

As to the preſent point, though there is no expreſs determination, it was the ſubject of diſcuſſion among the Judges at their chamber; an opinion was formed, but not delivered, by the ſame majority, that eſtabliſhed the ſecond rule in *Wiſcart verſus D'Auchy*; and the reaſoning of the Chief Juſtice in ſupport of that rule, went clearly to this caſe. I do not, therefore, think, that any new argument can be neceſſary. However diſpoſed I might have been originally to give the moſt liberal conſtruction to the act of Congreſs, the deciſion of the Court precludes me from conſidering the evidence, at this time, as a ſtatement of facts; and if there is no ſtatement of facts, the conſequence ſeems naturally to follow, that there can be no error.

THE COURT concurring in the repreſentation made by *Judge* PATERSON, they proceeded, without further argument on the principal queſtion, to

Affirm the Decree.

E. Tilghman ſuggeſted, however, that the damages were very high, and that, in fact, an allowance for counſel fees was included, though it did not appear on the record.

Du Ponceau, urged, that the court could not travel out of the record to aſcertain a fact. In the caſe where an allowance for counſel's fees had been ſtruck out, that charge and all the items on which damages had been awarded, were ſtated in an account annexed to the record.*

CHASE, *Juſtice*:—An account of items, as a foundation to award damages, was exhibited in the court below: but it is a ſufficient anſwer here, that the allowance does not appear on the record.

THE COURT concurred in this opinion; and *Du Ponceau* prayed an encreaſe of damages for the delay occaſioned by bringing this writ of error, contending, that under the 23d ſection of the Judicial

* See *Arcambel verſus Wiſeman*, *ant. p.* 306.

1797. Judicial Act, damages for delay were peremptorily prescribed, and that the discretion of the court only went to the award of single or double costs.

But, BY THE COURT:—The prize was sold by the agreement of the parties, the Captor and the *French* Consul; but the money was afterwards stopped in the hands of the Marshal, upon a monition issued by a third person (the original owner of the prize) who was not a party to the agreement. The decree must be affirmed without an encrease of damages; and the interest to the present day, must run upon the debt only, and not on the damages.

Du Ponceau, next prayed an allowance of 12 dollars and 50 cents, the cost of a printed state of the case for the use of the Judges.

But THE COURT observed, that, however convenient it might be, there was no rule authorising the charge; and, therefore, it could not be allowed.*

HUGER

* Though I have reported all that occurred in the Court upon the hearing of this cause, it may, perhaps, be of use to subjoin a copy of the printed case, which was allowed by *E. Tilghman* to be correct.

Jennings and *Venner*, Plaintiffs in Error, *versus* the brig Perseverance and her cargo, or the monies arising therefrom, in the hands of *William Peck*, Esq. Marshal of the district of Rhode Island, and *Louis Arcambal*, Claimant and Defendant in Error. } Writ of Error from the Circuit Court, for the district of Rhode Island.

Proceedings in the District Court, 20th September, 1794.

THE now Plaintiffs in error, subjects of the King of Great Britain, file their Libel, complaining of the capture made on the 27th of July preceding, of their brig Perseverance and her cargo, on the high seas, on a voyage from Turks Island, to St. John's, New Brunswick.

They state that she was captured by two armed vessels, each of about 35 tons burthen, one called the Sanspareil, the other the Senora, brought into the district of Rhode Island, under the care of John Baptiste Bernard, prize-master, sold by his order at Providence, for 5028 dollars, and the proceeds lodged in the hands of the Marshal of the district where they now are.

They complain that the Senora was *originally fitted out*, and the force of the Sanspareil was *encreased and augmented*, by adding to the number of guns and gun carriages, at Charleston, South Carolina, with intent to cruize, &c.

That at the time of capture, there were on board both the captured vessels, divers citizens of the United States, to wit, on board the Sanspareil 12, and on board the Serona 21, all of whom were aiding and assisting at the capture.

That there was no person on board of either of the capturing vessels duly commissioned to make captures, &c.

They pray restitution of the vessel and cargo, or the proceeds thereof.

PROCESS SERVED IN DUE FORM.

FIRST MONDAY IN NOVEMBER, 1794.

John Baptiste Bernard, prize-master, appears and pleads to the jurisdiction of the court—he grounds his plea upon the following reasons:

1st. That the legality of the capture had already been determined

under